149 U.S. 781

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~296.~~ 10 ~~9~~ ~~5~~ 2

LOUIS METTE AND GEORGE KANNE, COPARTNERS AS METTE & KANNE, PLAINTIFFS IN ERROR,

vs.

DANIEL L. McGUCKIN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

FILED JULY 2, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 296.

LOUIS METTE AND GEORGE KANNE, COPARTNERS AS METTE & KANNE, PLAINTIFFS IN ERROR,

vs.

DANIEL L. McGUCKIN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

INDEX.

	Original.	Print.
Caption	1	1
Petition in error	1	1
Transcript from district court of Douglas county	2	1
Bill of exceptions	3	2
Petition	4	3
Bill of particulars	5	4
Answer	7	5
Reply	9	6
Trial	10	7
Instructions given	10	7
Instructions refused	14	9
Verdict	15	11
Motion for new trial	16	11
Judgment	16	11
Clerk's certificate	12	18
Summons in error	18	12
Judgment	19	13
Opinion	20	13
Clerk's certificate	24	16
Application for writ of error	25	16
Writ of error	28	17
Return on writ of error	30	18
Citation	31	18
Proof of service of citation	32	18
Bond	33	19

JUDD & DETWEILER, PRINTERS, WASHINGTON, JULY 18, 1888.

1 Pleas before the supreme court of the State of Nebraska, at a term thereof, held at the capital, in the city of Lincoln, in said State, beginning on the 5th day of July, 1885.

Present: Hon. Amasa Cobb, chief justice; Hon. Samuel Maxwell & Hon. M. B. Reese, judges.

Attest: GUY A. BROWN, *Clerk.*

Be it remembered that on the 28th day of May, 1885, there was filed in the office of the clerk of said court a petition in error, transcript, and bill of exceptions, which were in the words and figures following, to wit:

Petition in Error.

In the Supreme Court, State of Nebraska.

LOUIS METTE and GEORGE KANNE, Copartners Doing Business under the Firm Name of Mette & Kanne, Plaintiffs in Error,

vs.

DANIEL L. MCGUCKIN, Defendant in Error.

The said Louis Mette and George Kanne, copartners as Mette & Kanne, complain of the said Daniel L. McGuckin, defendant, for that the said Daniel L. McGuckin, at the February term of the district court in and for Douglas county, A. D. 1885, recovered a judgment by the consideration of said court against the said plaintiff in a certain action then pending in said court, wherein the said Louis Mette and George Kanne, copartners aforesaid, were
2 plaintiffs and the said Daniel L. McGuckin was defendant, a copy of the record and of the judgment and proceedings in which case, duly certified, is hereto attached, marked "A" and made a part of this petition, and the said plaintiffs aver that there is error in the said record and proceedings, in this, to wit:

1. That the said court erred in the instructions given to the jury on the trial of said action, marked "Given," and erred in the giving of each of said instructions.

2. The court erred in refusing to give the instructions which the said plaintiffs asked the court to give, marked "Refused" and "Not given," and erred in the giving of each of said instructions.

3. The court erred in not sustaining the demurrer of the plaintiffs to a part of the said defendant's answer filed in said case.

4. That said judgment was given to the said defendant when it should have been given to the said plaintiffs.

The said plaintiffs therefore pray that the said judgment may be reversed and the said plaintiffs restored to all things they have lost by reason thereof.

WARREN SWITZLER,
Att'y for the Pl'ffs in Error.

(Endorsed:) Filed May 28th, 1885. Guy A. Brown, clerk.

Bill of Exceptions.

District Court, Douglas County, State of Nebraska.

LOUIS METTE and GEORGE KANNE, Copartners Doing Business under the Firm Name of Mette & Kanne, Plaintiffs,

vs.

DANIEL L. MCGUCKIN, Defendant.

3 Be it remembered that on the trial of this cause in the district court in and for Douglas county, Nebraska, at the February term thereof, 1885, evidence had been given tending to show that the goods sued for in the suit were intoxicating liquors sold by the plaintiffs, who were then wholesale dealers in said merchandise in St. Louis, Missouri, and residents of said State; that they had no place of business in Omaha or in this State; that some of said goods were sold by traveling agents of plaintiffs while in Omaha, and some were sold to defendant in person at the place of business of plaintiffs in said St. Louis, Missouri; that there was testimony conflicting as to where the goods were to be delivered, and there was testimony conflicting as to the true status of the accounts between the parties.

After the evidence had been introduced the plaintiffs asked the court to give to the jury the instructions attached hereto marked "Refused" and "Not given," which was refused by the court; to which refusal to give said instructions the plaintiffs then and there, by their counsel, duly excepted.

That at the conclusion of said evidence the court instructed the jury as contained in the instructions attached hereto, marked "Given," to the jury, *of* which said instructions the plaintiffs, by their counsel, then and there duly excepted.

(Endorsed:) Filed May 28th, 1885. Wm. H. Ijams, clerk.

Pleas before the Honorable Eleazer Wakely, judge of the district court of the third judicial district of the State of Nebraska, at a term thereof, within and for the county of Douglas, begun and held at the city of Omaha on the 2nd day of February, A. D. 1885.

4 Be it remembered that heretofore, to wit, on the 5th day of February, A. D. 1884, Louis Mette *et al.*, by Warren Switzler, their attorney, filed in the office of the clerk of said court their petition against Daniel L. McGuckin; which said petition reads and is in the words and figures following, to wit:

Petition.

District Court, Douglas County, State of Nebraska.

LOUIS METTE and GEORGE KANNE, Copartners Doing Business under the Firm Name of Mette & Kanne, Plaintiffs,

vs.

DANIEL L. MCGUCKIN, Deft.

The plaintiffs allege they are now and were at the times hereinafter named copartners doing business under the firm name of Mette & Kanne, and residing and doing business at St. Louis, Mo.; that heretofore, to wit, on divers dates from March, 1880, up to and including May, 1881, they sold and delivered to defendant certain goods and merchandise of the value of $1,425.15, the defendant agreeing to pay the said sum for said goods; that there has been paid on the same only the sum of $1,232.60, and there is due from defendant to plaintiffs for said goods $192.00, with interest from Sept. 15, 1880. Demand has been made on said defendant — said sum of money and he refused to pay the same.

An itemized account of said goods and merchandise is hereto attached, marked "Exhibit A."

Wherefore the plaintiffs pray judgment against the defendant for $192.00, with interest from September 15, 1880.

WARREN SWITZLER,
Att'y for Pl'ffs.

5 STATE OF NEBRASKA, } ss:
Douglas County, }

Warren Switzer, being by me first duly sworn, on his oath states he is the attorney for the plaintiffs in this case; that the plaintiffs are non-residents of and now absent from this State; that he has read the foregoing petition and believes the facts there stated are true.

WARREN SWITZLER.

Subscribed in my presence and sworn to before me this 4th day of February, 1884.

[SEAL.]

A. C. TROUP,
Notary Public, Douglas Co., Neb.

Louis Mette. George Kanne.

ST. LOUIS, *March 26th*, 1880.

Mr. D. L. McGuckin, Omaha, Neb., bought of Mette & Kanne, wholesale dealers in imported and domestic wines & liquors, No. 403 North Main street.

Terms 60 days.

	$42\frac{1}{2}—3\frac{1}{2}=39$		
	2 bbls. McBrayer, $42\frac{1}{2}—3=39\frac{1}{2}$		
	$78\frac{1}{2}$ -- 3.10		243 35
	1 case Old Tom gin		7 00
	Drayage		50
July 17.	$\frac{1}{2}$ gross $\frac{1}{2}$-pint flasks, 7.00	3 50	
	$\frac{1}{2}$ " pint " 9.00	4 50	
		8 00	
	Less 20%	1 60	
			6 40
	100 McBrayer labels		50
	2 boxes, 1, .50; 1, .40		90
Aug. 5.	1 case champagne pints		13 00
	1 " do. "		11 00
	1 " Vinum de Vite		5 00
	1 " sherry wine		7 00
	1 " port "		7 00
6	1 " pisporter		15 00
	1 " Niersteiner		9 00
	1 " brandy		8 00
	1 " apple brandy		8 00
	1 " peach "		9 00
	$\frac{1}{2}$ " Jam. rum, 8.50		4 25
	2 bottles maraschino, 1.35		2 70
	2 " curacoa, 1.25		2 50
	2 " vermouth, 1,50		3 00
	2 " absinthe, 1.25		2 50
	6 " angostura, .90		5 40
	2 " annesette, 1.25		2 50
	Drayage		50
Sept. 15.	$\frac{1}{8}$ pipe gin, $21\frac{1}{2}—1=20\frac{1}{2}$ -- 3.50		71 75
	Drayage		25
Oct. 14.	5 gal's keg c. 70 Calif. brandy, 4.50		23 20
	$4\frac{1}{2}$ " " & box 95 Scotch, 6.00		27 95
	10 " " c. 90 rum punch, 2.00		20 90
	$4\frac{1}{2}$ " " & box 90 Jam. rum, 5.00		23 45
	5 bbls. Bourbon, $203\frac{1}{2}$ gall's, 2.90		590 15
	Drayage		50
Dec. 23.	25 cases St. Gotthard bitters, 6.00		150 00
May 25.	25 cases " "	150 00	
1881.	Less freight	7 00	
			143 00

Cr.

'80.			
July 12.	By cash	120 00	
Sept. 18.	" "	120 00	
" 28.	" "	10 85	
Dec. 13.	" "	100 00	
'81.			
Mar. 8.	" "	112 00	
Apr. 15.	By mdse. freight	7 50	
7	" " "	106 50	
May 20.	" " "	100 00	
June 29.	By mdse. expense	100 00	
Aug. 1.	" "	152 50	
Sept. 30.	" "	100 00	
Oct. 6.	" mdse.	3 25	
Nov. 21.	" cash	100 00	
'82.			
Aug. 11.	" "	100 00	
			1,232 60
	Balance	192 55	

With interest after maturity.

Afterwards, on the 4th day of March, A. D. 1884, an answer was filed herein as follows, to wit:

Answer.

In the District Court in and for Douglas County, State of Nebraska.

LOUIS METTE and GEORGE KANNE, Copartners under Firm Name of Mette and Kanne, Plaintiffs,

vs.

DANIEL L. MCGUCKIN, Defendant.

Comes now the above defendant, and for an answer to the petition of plaintiffs filed herein alleges as follows:

I. First defense. Said defendant avers that all of the goods purchased by said defendant of said plaintiffs were intoxicating liquors sold and delivered by said plaintiffs to said — at Omaha, Nebraska, in 1880, 1881, & 1882, and said plaintiffs ought not to recover the price or value thereof, or any other sum, because said sales were illegal in this, that said plaintiffs had no valid or legal license to sell the same.

II. Second defense. Said defendant denies that he is in-
8 debted to plaintiffs in any sum whatsoever, but alleges the fact to be that he has paid said plaintiffs in full for all property purchased by him of them. Defendant denies each and every allegation of said petition not herein expressly admitted.

III. Counter-claim:

And said defendant further says that said plaintiffs are indebted to him in the sum of four hundred and seventy-four and $\frac{40}{100}$ dol-

lars for money had and received by plaintiffs from said defendant in excess of the sum which they were entitled to receive.

Defendant says that by reason of a mistake as to the amount of his indebtedness and false representations of plaintiffs and their agents said defendant has overpaid said plaintiffs said sum of $474.40, and said plaintiffs are now indebted to defendant in said sum of $474.40.

Wherefore said defendant prays judgment against said plaintiffs for said sum of $474.40 and costs of suit.

WALTER BENNETT,
Att'y for Defendant.

STATE OF NEBRASKA, } ss:
Douglas County, }

Daniel L. McGuckin, being first duly sworn, deposes and says that he is the defendant in the above case; that he knows the contents of the foregoing answer, and the allegations therein contained are true as he verily believes.

D. L. McGUCKIN.

Subscribed in my presence and sworn to before me this third day of March, A. D. 1884.

[SEAL.] E. M. STENBERG,
Notary Public.

9 Afterwards, on the 5th day of August, A. D. 1884, a reply was filed herein as follows, to wit:

Reply.

District Court, Douglas County, State of Nebraska.

LOUIS METTE *et al.*, Pl'ff, *vs.* DANIEL L. MCGUCKIN, Def't.

For reply to the amended answer filed herein the plaintiffs deny the goods mentioned and referred to in the plaintiffs' petition were sold in Omaha, Douglas county, Nebraska, and allege they were sold in the State of Missouri.

Plaintiffs deny every allegation of new matter contained in the defendant's answer, except the allegation therein alleging the plaintiffs had no license, and to that allegation the plaintiffs demur on the ground that the said allegation does not state facts sufficient to constitute a defense to the plaintiffs' cause of action or any part thereof in favor of the said defendant.

The plaintiffs deny they owe the defendant anything or any sum of money whatever.

Wherefore they pray judgment as asked in their petition.

WARREN SWITZLER,
Att'y for Pl'ffs.

DOUGLAS COUNTY, } ss:
State of Nebraska, }

Warren Switzler, being by me first duly sworn, on his oath states he is the attorney for the plaintiffs in this suit and has read the foregoing reply, and he believes the facts there stated are true; that the plaintiffs are non-residents of and now absent from this State.

WARREN SWITZLER.

10 Subscribed in my presence and sworn to before me this 4th day of Aug., 1884.

[SEAL.]

A. C. TROUP,
Notary Public, Douglas Co., Neb.

Afterwards, at the February term of said court and on the 3rd day of March, A. D. 1885, this cause came on for trial as follows, to wit:

Trial.

LOUIS METTE *et al. vs.* DANIEL L. MCGUCKIN.

Now came the parties herein, by their attorneys; also came the following-named persons as jurors, to wit: John F. Dailey, A. R. Dufrene, John Petz, John Robbins, John C. Christiansen, Jefferson O'Neil, Michael Riley, August Schroder, Leopold Doll, R. D. Pieronet, John B. Nelson, and John Taylor, who were duly impaneled and sworn according to law.

And the said jury having heard the testimony adduced by the parties and the arguments of counsel in part, the case was continued until to-morrow morning at 9½ o'clock.

Afterwards, on the 4th day of March, A. D. 1885, the following instructions for the jury, as given and refused, were filed herein, to wit:

Instructions Given.

In District Court, Douglas County.

11 LOUIS METTE *et al. vs.* D. L. MCGUCKIN.

The jury is instructed as follows:

1. The plaintiffs seek in this action to recover a balance alleged to be due them for goods and merchandise sold and delivered to defendant.

(Excepted to by pl'ffs, Mar. 4, 1885.—W. S.)
Given.

2. The defendant claims that he has overpaid the plaintiffs by reason of mistakes and false representations of plaintiffs and their agents, claims a considerable balance as due to him, and pleads a counter-claim therefor.

(Excepted to by pl'ffs, Mar. 4, 1885.—W. S.)
Given.

3. There is a controversy as to the true state of the account between the parties, the defendant insisting that certain payments were not credited to him and certain goods returned by him were not so credited.

As to this you will determine from the evidence what the fact is, and allow or disallow the disputed items as you may find the evidence to justify.

(Excepted to by pl'ffs, Mar. 4, 1885.—W. S.)
Given.

3. The defendant also insists that the plaintiffs cannot recover because they had no license to sell spirituous or vinous liquors in the city of Omaha, where, as defendant claims, the goods were sold and delivered.

(Excepted to by pl'ffs, Mar. 4, 1885.—W. S., att'y.)

In respect to this you are instructed as follows:

1. By the law of this State it is unlawful to sell spirituous or vinous liquors without a license therefor at any place within the city of Omaha; and there can be no recovery for the price of
12 any such liquors sold without a license duly issued authorizing such a sale.

(Excepted to by pl'ffs, Mar. 4, 1885.—W. S., att'y.)
Given.

(2.) It is conceded that the plaintiffs had no license and therefore they cannot recover for any spirituous or vinous liquors sold and to be delivered to defendant in Omaha.

(Excepted to by pl'ffs, Mar. 4, 1885.—W. S., att'y.)
Given.

(3.) But this rule would not apply to any sales of liquors which by the contract of the parties were to be delivered to defendant in St. Louis, or to a common carrier in St. Louis, for the defendant. You should therefore ascertain and determine from the evidence at what place, according to the agreement and understanding of the parties, the liquors were to be delivered to or for the defendant so as to become his property as between himself and the plaintiffs.

(Excepted to by pl'ffs, Mar. 4, 1885.—W. S., att'y.)
Given.

(4.) The burden of proof is upon defendant to sustain the defense of illegality so far as it depends upon the place of sale and delivery by a fair preponderance of evidence to your satisfaction.

(Excepted to by pl'ffs, Mar. 4, 1885.—W. S., att'y.)
Given.

4. If you find it necessary to inquire upon which particular sale or sales any payment or payments should be applied or credited you will be governed by the following criterion:

(Excepted to by pl'ffs, Mar. 4, 1885.—W. S., att'y.)
Given.

(1.) If there was an agreement or understanding between
13 the parties that the payment should apply on any particular sale, whether legal or illegal, that was binding, and you should so apply it.

(Excepted to by pl'ffs, Mar. 4, 1885.—W. S., att'y.)
Given.

(2.) If there was no such agreement, then defendant had a right to direct, when he made the payment, how it should be applied; and if he did so direct that was binding, and you should so apply it.

(Excepted to by pl'ffs, Mar. 4, 1885.—W. S., att'y.)
Given.

(3.) If there was no agreement or understanding as aforesaid and no direction of defendant on the subject and the payment was made generally on the account, then the law applies it upon the legal and not on the illegal items, if there were both, and you should so apply it.

(Excepted to by pl'ffs, Mar. 4, 1885.—W. S., att'y.)
Given.

5. If you find for the plaintiffs you will include interest from six months after the last items of the account or any balance then due to the 2nd day of February last, being the first day of this term, at 7 per cent. per annum, and if you should find a balance due to defendant you will be governed by the same rule.

(Excepted to by pl'ffs, Mar. 4, 1885.—W. S., att'y.)
Given.

1. The jury is instructed that the general rule (unless it otherwise appears so modified) is, unless it otherwise appears, that goods are to be delivered at the place where they are at the time of the sale—the store of the merchant or the shop of the manufacturer. The burden of proof in this case is upon the defendant to show by a preponderance of testimony that the goods were to be delivered to him
14 in Omaha and not on the cars in St. Louis, as claimed by the plaintiffs.

Given.—E. W.

The jury are instructed that if they find that the goods for which plaintiffs claim a balance is due them from defendant were sold by plaintiffs to defendant to be delivered in Omaha, Nebraska, that then it would be immaterial whether such goods were purchased by defendant while in St. Louis or at Omaha through the agent of plaintiffs.

(Excepted to by pl'ffs, Mar. 4, 1885.—W. S., att'y.)
Given.—E. W.
Instructions refused.

2. If you find that the goods sued for herein were bought by defendant in person in St. Louis, then the laws of Nebraska, with respect to license, do not apply.

Refused. (Ignores place of delivery.)
Exc. by pl'ffs.
(Excepted to by pl'ffs, Mar. 4, 1885, for not giving.—W. S., att'y.)

3. Although you may believe that the goods sued for in this case were contracted for in Omaha, yet if you further find the contracts were made by traveling agents whose authority only extended to taking orders which would not be binding on these plaintiffs until ratified in St. Louis, Missouri, then in such case they become, after ratification in St. Louis, Missouri, contracts, and are not governed by the statutes of Nebraska with respect to liquor license.

Refused (same as in No. 2). Exc. by pl'ff.
(Not given. Excepted to.—W. S., att'y.)

4. If you find the defendant received and used the goods sued for he is estopped to deny the right of the plaintiffs to recover on the ground of want of a license in this State.

15 Refused.—E. W. Exc. by pl'ffs.
(Not given. Excepted to.—W. S., att'y.)

5. You are instructed that it is not necessary for wholesale dealers in intoxicating liquors to take out license in this State in order to entitle them to do business as such wholesalers in this State.

Refused. Exc. by pl'ffs.
(Not given. Excepted to.—W. S., att'y.)

6. You are further instructed that if you believe the plaintiffs, at the times the goods in controversy were sold, were doing business as wholesalers in St. Louis, Missouri, and had no place of business in Nebraska and that the goods were sold by the St. Louis house, then in that case it is no defense for the defendant that the plaintiffs had no liquor license issued in this State.

Refused. Exc. by pl'ffs.
(Not given. Excepted to.—W. S., att'y.)

Afterwards, at the February term of said court and on the 4th day of March, 1884, again came the said parties, by their attorneys, also came the said jury heretofore impaneled and sworn, and the trial proceeded; and the said jury, having heard the remaining arguments of counsel and charge of the court, after deliberation, return the following verdict, to wit:

Verdict for Defendant.

STATE OF NEBRASKA:

In District Court for Douglas County.

METTE *et al.*, Plaintiffs, *vs.* DANIEL L. MCGUCKIN, Defendant.

We, the jury, duly impaneled and sworn to try the issue joined between the said parties, do find for the defendant and do assess his damages at the sum of fifty-six and $\frac{70}{100}$ dollars.

16 A. R. DUFRENE, *Foreman.*

Afterwards, on the 6th day of March, A. D. 1885, a motion for a new trial was filed herein as follows, to wit:

Motion for New Trial.

District Court, Douglas County, Nebraska.

METTE *et al. vs.* MCGUCKIN.

Now come the plaintiffs and move the court for an order setting aside the verdict of the jury in this case and granting a new trial for the following reasons, viz:

1. The verdict of the jury is not sustained by sufficient evidence and is contrary to law.
2. Error of the court in giving instructions, which were duly excepted to, and in refusing to give instructions asked by plaintiffs.
3. Error of law occurring at the trial and excepted to by the plaintiffs.

WARREN SWITZLER,
Att'y for Pl'ffs.

Afterwards, at the February term of said court and on the 14th day of March, A. D. 1885, a judgment was entered herein as follows, to wit:

Judgment.

LOUIS METTE and GEORGE KANNE, Copartners Doing Business under the Firm Name of Mette and Kanne, Appellants,

vs.

DANIEL L. MCGUCKIN, Appellee.

This cause being heard on the motion of the said plaintiffs
17 to set aside the verdict of the jury rendered in this action on a former day of this term and for a new trial herein, the court does, on consideration, overrule the said motion; to which ruling of the court the said plaintiffs except, and are hereby allowed forty days from the rising of this court at its present term to prepare and serve their bill of exceptions herein.

Thereupon the said defendant moved the court for judgment on the verdict.

It is therefore considered by the court that the said defendant go hence without day and recover from the said plaintiffs the sum of fifty-six $\frac{70}{100}$ dollars, his damages as by the verdict of the jury assessed, and his costs herein expended, taxed at $—.

Res'd May 19th, 1885.

W. J. CONNELL,
Att'y for Def't.

MAY 23RD, 1885.

No corrections or additions required, & bill of exceptions herewith returned.

W. J. CONNELL,
Att'y for Def't.

The decree and foregoing bill of exceptions allowed and signed at the request of counsel for defendant on this 25th day of May, A. D. 1885.

ELEAZER WAKELY, *Judge.*

18 *Certificate.*

THE STATE OF NEBRASKA, } ss:
Douglas County, }

I, Wm. H. Ijams, clerk of the district court in and for Douglas county, Nebraska, do hereby certify that the foregoing is a full and true transcript of the proceedings in the case of Louis Mette *et al.* against Daniel L. McGuckin and all thereof appearing of record in said court.

I do further certify that the bill of exceptions hereto attached and made a part of this transcript is the original bill of exceptions filed in the office of the clerk of said court in the above-entitled action.

Witness my signature and the seal of said court, at the city of Omaha, this 26th day of May, A. D. 1885.

[SEAL.] WM. H. IJAMS, *Clerk.*

Transcript, $7.00, p'd by W. Switzler.

(Endorsement:) 2250. Filed May 28th, 1885. Guy A. Brown, clerk.

And thereupon, to wit, on the 28th day of May, there issued out of said clerk's office a certain summons in error in the words and figures following, to wit:

THE STATE OF NEBRASKA, *ss:*

To the sheriff of the county of Douglas:

You are hereby commanded to notify Daniel L. McGuckin that a petition in error has been filed in the supreme court of the State of Nebraska by Mette & Kanne, asking the reversal of a judgment

against them rendered at the February term, 1885, in a certain cause in the district court of said county, wherein said
19 Mette & Kanne were plaintiffs and said McGuckin was defendant, and to appear before the supreme court, at the city of Lincoln, on the 7th day of July, 1885, then and there to do and receive what the said supreme court shall order in the premises.

You will make due return of this summons on or before the 7th day of July, 1885.

Witness my hand and the seal of said court, at the city of Lincoln, this 28th day of May, 1885.

[SEAL.] GUY A. BROWN, *Clerk.*

(Endorsed:) General No. 2250. Supreme court, State of Nebraska. Mette & Kanne *vs.* Daniel L. McGuckin. Summons in error.

And afterwards, to wit, on the 8th day of June, the said summons was returned endorsed as follows, to wit:

Omaha, Neb, May 30, '85.—I hereby accept due service of the within summons in error on behalf of Daniel L. McGuckin, defendant in error. W. J. Connell, att'y for def't in error.

(Endorsed:) Returned and filed 8 June, 1885. Guy A. Brown, clerk.

And afterwards, to wit, on the 21st day of October, a certain judgment was rendered and entered of record in the words and figures following, to wit:

LOUIS METTE *et al.*, Plaintiffs,
vs.
DANIEL L. MCGUCKIN, Defendant. } No. 2250.

Error from the district court of Douglas county.

This cause came on to be heard, was taken up, and argued
20 by counsel; on consideration whereof the court finds there is no error apparent on the record in said proceedings and judgment. It is therefore considered by the court that the said judgment be, and the same hereby is, affirmed and that the defendant recover of the plaintiffs his costs, taxed at $——, and that a special mandate issue accordingly.

And afterwards, to wit, on the 21st day of October, there was filed a certain opinion in the words and figures following, to wit:

REESE, *J.:*

There is but one question involved in this case, to wit, the constitutionality of chapter fifty of the Compiled Statutes of 1885, commonly known as the "Slocumb liquor law." The constitutionality of the act in question was presented to this court and passed upon in Pleuler *v.* The State, 11 Neb., 547, but the point now presented was not then considered, but the general proposition advanced in that case is applicable to this—which is, that "to justify a court in

pronouncing an act of the Legislature unconstitutional it must be clear and free from reasonable doubt that it is so, not a doubtful and argumentative implication; or, in other words, a statute should not be held invalid unless it is clearly forbidden by the paramount law. Such, substantially, has been the holding of all courts speaking upon this subject." See cases there cited.

The grounds upon which plaintiffs in error base their attack upon the law in question is that no license can be issued to any person to sell liquor unless he be a resident of this State, and hence the law is absolute prohibition so far as it affects persons who are not residents; that it thus becomes prohibitory to non-residents and a license law to the citizen, and that this is in violation of arti-
21 cle four of the Constitution of the United States, which provides that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States;" that it is also in violation of the fourteenth amendment to the same Constitution, which provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

As we view the question here presented it could serve no good purpose to enter into a lengthy discussion of the provisions of the Constitution above cited. It is enough to say that we think they have no application to the case at bar. While it is true that every person, unless prohibited by some statute or other municipal enactment, has the legal right to sell intoxicating liquors, and to that extent may be denominated a "natural right," as insisted by plaintiff in error, yet it is not, perhaps, one of the inalienable rights of the citizen which are so sedulously guarded by the Constitution and laws of our common country. From the earliest stages of our present civilization the sale of intoxicating liquors has been looked upon as a species of trade which was, or might be, injurious to the public weal; and hence it has been at all times considered a proper subject of police regulation, not as affecting the questions of the commercial interests of the country, but as affecting directly the welfare of the citizen and public morals. It has been held by this court and declared in the very able opinion written by Judge Lake in Pleuler *v.* The State, *supra*, that the act under consideration was not intended as a tax upon the traffic in intoxicating liquors, nor for the purpose of raising revenue, but was an exercise of the ample police power of the State for the purpose of regulation. In that case he says: "To our minds it is clear that the restriction (of the Constitution) relied on has no proper application to this case, and that the au-
22 thority given by the act regulating the sale of spirituous liquors is but a proper exercise of the police power of the State, of which, by the Constitution, the Legislature is made the sole custodian and dispenser, and not an exercise of the power of taxation. That regulation of a traffic believed by the Legislature to be pernicious in its effects upon society, and not the raising of revenue merely, is the chief design of the act, it would seem no man of intelligence can doubt who reads it."

In Jones *v.* The People, 14 Ill., 196, in speaking of the exercise of

this power, Judge Trumbull, in writing the opinion, says: "By virtue of its police power every State must have the right to enact such laws as may be necessary for the restraint and punishment of crime, and for the preservation of the public peace, health, and morals of its citizens. It is upon this principle that the sale of lottery tickets and of cards and other instruments for gaming is prohibited, and whoever questioned the constitutionality or validity of such laws? A government that did not possess the power to protect itself against such and similar evils would scarcely be worth preserving."

We may be pardoned if we transfer to this page a part of section 995 of Mr. Bishop's excellent work upon the subject of statutory crimes. In discussing the general question now under consideration, he says: "The doctrine governing this whole subject may be summed up thus: The State, in the enactment of its laws, must exercise its judgment concerning what acts tend to corrupt the public morals, impoverish the community, disturb the public repose, injure the other public interests, or even impair the comfort of individual members, over whom its protecting watch and care are required, and the power to judge of this question is necessarily reposed alone in the Legislature, from whose decision no appeal can be taken,
23 directly or indirectly, to any other department of the Government. When, therefore, the Legislature with this exclusive authority has exercised its right of judging concerning this legislative question, by the enactment of prohibitions like those discussed in this chapter, all other departments of the Government are bound by the decision which no court has a juriisdiction to revew."

Finding the police power of the State being thus plenary and complete, and that so long as the enactment is within the exercise of this power, we are relieved from any serious trouble arising out of the question here presented.

It is conceded that the Legislature has power to regulate the sale of intoxicating liquors by a license to be issued before the sale can be lawfully made, or that it might, if it saw fit, prohibit the sale altogether. We think it must also be conceded that this would be an exercise of the police power. It must be conceded that it has the right to require the execution of and delivery to the officers of the State the bond required by law in order that the community may be protected from the results of an improper use or abuse of the license. Why, then, has it not the power to say that the person to whom the license is issued and who gives the bond shall be such an one as is subject to the laws of the State and to the jurisdiction of her courts and liable to their processes? Any other view would completely destroy the efficacy of the law and deprive the people of the protection which the law is intended to give.

Numerous instances might be cited where the Legislatures, in the exercise of this power, have required that such persons, including corporations, as may have placed themselves within its provisions shall be citizens and subject to its jurisdiction, but it is thought unnecessary to do so.

The act in question being the exercise of the police power
24 of the State, and not for the purpose of revenue or of regulating commerce, it follows that it is not in violation of the

constitutional provisions referred to, and the decision of the district court was correct. The judgment is therefore affirmed.

Judgment affirmed. The other judges concur.

STATE OF NEBRASKA, *ss:*

I, Guy A. Brown, clerk of the supreme court of said State, do hereby certify that the foregoing is a true and complete copy of the record and proceedings in an action lately pending in said court, wherein Mette & Kanne were plaintiffs and Daniel L. McGuckin was defendant.

In testimony whereof I have hereunto set my hand and the seal of said court this 15th day of April, A. D. 1886.

[Seal of Supreme Court of Nebraska.]

GUY A. BROWN, *Clerk.*

Fees, $10.

25 *Application for Writ of Error.*

In the Supreme Court, United States of America.

LOUIS METTE and GEORGE KANNE, Copartners as Mette and Kanne, Plaintiffs in Error,

v.

DANIEL L. MCGUCKEN, Defendant in Error.

To his honor Mr. Justice Miller, associate justice of the Supreme Court of the United States, Washington, D. C.:

I beg to hand you herewith the transcript of a case lately decided in the supreme court of Nebraska, which the plaintiffs in error desire brought to the Supreme Court of the United States on error. The record is so brief that it will perhaps speak for itself more satisfactorily than a synopsis made by me.

26 However, it may be proper to state that the case was brought by the plaintiffs in error as wholesale liquor dealers in and residents of St. Louis, Missouri, against defendant, a dealer in and resident of Omaha, Nebraska, to recover for the value of intoxicating liquors sold by plaintiffs to defendant.

The proof tended to show that some of the goods were to be delivered in Omaha and some in St. Louis. The court instructed the jury, against the objections of the plaintiffs in error, that in order to entitle them to a recovery the plaintiffs must have had a liquor license issued under the laws of Nebraska.

The section of the Nebraska statute in question is No. 1, chap. 50, page 333, Compiled Statutes 1881, and provides that in order to obtain a license to sell liquor in this State a "petition" must be filed with the proper authorities "setting forth that the applicant is a man of respectable character and standing and a resident of this State, and praying that a license may be issued to him." It will

27 be seen that in order to obtain the license a man must be a resident of the State.

We claim that this involves a Federal question, being inimical to the following clauses of the Federal Constitution, viz:

The second section of article four, which provides, "The citizens of each State shall be entitled to all privileges and immunities of citizens of the several States;" and the fourteenth amendment, which further provides, "No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States," and the same amendment declares that citizens of the United States are "citizens of the State wherein they reside." It further violates the exclusive right of Congress to regulate commerce between States.

This issue is brought directly to the front in the case, and as the supreme court of the State upheld the lower court in instructing the jury that we were compelled to have a license which the law at the same time made it impossible for us to get, we respectfully ask your honor to grant us a writ of error to the said the supreme court of the State of Nebraska.

METTE *et al.*,
By WARREN SWITZLER,
Their Attorney.

[Endorsed:] Mette *et al. vs.* McGucken. Application for writ of error.

28 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Nebraska, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Louis Mette and George Kanne, copartners doing business under the firm name of Mette & Kanne, plaintiffs in error, and Daniel L. McGuckin, defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the
29 Constitution, or of a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened to the great damage of the said plaintiffs in error, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid,

with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the third day of June, in the year of our Lord one thousand eight hundred and eighty-six.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
SAM. F. MILLER,
Justice Sup. Court U. S.

30 THE STATE OF NEBRASKA, *ss:*

I, Guy A. Brown, clerk of the supreme court of said State, do hereby certify that, in obedience to the within command, I hereto attach the transcript of the record and proceedings within mentioned and all things concerning the same.

In witness whereof I hereunto set my hand and the seal of the supreme court of Nebraska this June 16, 1886.

[Seal Supreme Court of Nebraska.]

GUY A. BROWN,
Clerk Supreme Court Nebraska.

31 The United States of America to Daniel L. McGuckin, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Nebraska, wherein Louis Mette and George Kanne, copartners doing business under the firm name of Mette & Kanne, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel F. Miller, associate justice of the Supreme Court of the United States, this 3d day of June, in the year of our Lord one thousand eight hundred and eighty-six.

SAM. F. MILLER,
Justice Sup. Court U. S.

32 On this 22nd day of June, in the year of our Lord one thousand eight hundred and eighty-six, personally appeared Wm. Coburn, sheriff of Douglas county, Neb., before me, the sub-

scriber, Wm. H. Ijams, clerk of the district court within and for Douglas county, Nebraska, and makes oath that he delivered a true copy of the within citation to Daniel L. McGuckin, in Douglas county, Nebraska, on the 21st day of June, A. D. 1886.

WM. COBURN,
Sheriff of Douglas County, Neb.

Sworn to and subscribed the 22nd day of June, A. D. 1886.
[Third District Court Seal, Douglas County, Nebraska.]

WM. H. IJAMS,
Clerk of the District Court, Douglas County, Nebraska.

Fees	75
Mileage	10
Affidavit	25
	$1 10 Paid.

33 Know all men by these presents that we, Louis Mette, George Kanna, and Andrew Geisel, are held and firmly bound unto Daniel L. McGucken in the full and just sum of three hundred dollars ($300), to be paid to the said Daniel L. McGucken, his certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fifteenth day of May, in the year of our Lord one thousand eight hundred and eighty-six.

Whereas lately, at a term of the supreme court of the State of Nebraska, in a suit depending in said court between Louis Mette and George Kanne, copartners, and Daniel L. McGucken, a judgment was rendered against the said Louis Mette and George Kanne, and the said Louis Mette and George Kanne having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment and decree in the aforesaid suit, and a citation directed to the said —— —— citing and admonishing — to be and appear at the Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Louis Mette and George Kanne shall prosecute said writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of—

LOUIS METTE. [SEAL.]
GEORGE KANNE. [SEAL.]
ANDREW GEISEL. [SEAL.]

Approved by—
SAM. F. MILLER,
Judge Sup. Court.
June 3, 1886.

34 UNITED STATES OF AMERICA, } ss:
Eastern District of Missouri, }

Andrew Geisel, obligor in the within bond, being duly sworn, on his oath, deposes and says that he is worth, over and above all his debts and liabilities, the sum of five thousand dollars, and that he owns real estate to that amount subject to execution within the State of Missouri.

ANDREW GEISEL.

Subscribed and sworn to by said Andrew Geisel, the above-named affiant, this 19th day of May, A. D. 1886, before me, at office, in the city of St. Louis.

A. P. SELBY, [SEAL.]
Clerk U. S. Cir. Court, E. Dist. Mo.

(Endorsed:) Supreme Court of Nebraska. Filed June 14th, 1886. Guy A. Brown, clerk.

Endorsed on cover: Nebraska supreme court. No. 296. Louis Mette & George Kanne, copartners as Mette & Kanne, plaintiffs in error, *vs.* Daniel L. McGuckin. Filed July 2, 1886.

Office Supreme Court U. S.
FILED.
OCT 14 1892
JAMES H. McKENNEY,
CLERK.

CASE No. 12,055.

Supreme Court of the United States.

OCTOBER TERM, 1892.

Term No., 2.

LOUIS METTE ET AL., PLAINTIFFS IN ERROR,

vs.

DANIEL L. McGUCKIN.

BRIEF FOR THE PLAINTIFFS IN ERROR.

J. M. WOOLWORTH.
W. SWITZLER,
For Plaintiffs in Error.

CASE No. 12,055.

Supreme Court of the United States.

OCTOBER TERM, 1892.

Term No., 2.

LOUIS METTE ET AL., PLAINTIFFS IN ERROR,

vs.

DANIEL L. McGUCKIN.

BRIEF FOR THE PLAINTIFFS IN ERROR.

This is a writ of error to the supreme court of the State of Nebraska. It was an action originally brought in the district court of Douglas county of that State to recover a balance upon an account for goods—that is to say, wines and liquors—sold by the plaintiffs to the defendant. The petition contained the allegation that the plaintiffs resided and did business at St. Louis, in the State of Missouri. The defense, so far as it is necessary to state it here, was that the sales were illegal because the plaintiffs had no license to sell the same. The trial was to a jury. The bill of exceptions shows that upon the trial there was evidence

tending to show that the plaintiffs were wholesale dealers in intoxicating liquors in St. Louis, Missouri, and were residents of that State; that some of the goods were sold by their agents while in Omaha, and some to the defendants in person at their place of business in St. Louis. The court charged the jury that it was unlawful to sell spirituous liquors without a license in the city of Omaha, and that no recovery could be had for the price of such liquors sold without a license duly issued authorizing such sale, and that as the plaintiffs admitted that they had no license they could not recover for liquors sold in Omaha; to which directions the plaintiffs excepted.

They requested the court to direct the jury that if they believed that when the sales were made the plaintiffs were doing business in St. Louis and had no place of business in Nebraska, and that the goods were sold by the St. Louis house, it was no defense that they had no license. The court refused to so charge, and the plaintiffs excepted.

The ground of the defense and of the directions given by the court to the jury and the refusals to charge as requested by the plaintiffs was that the statute of the State forbade sales of liquors unless the party selling them had a license to do so. On the other hand, the ground of the plaintiffs' request, above stated, was that the statute which required a license violated the Constitution of the United States, because it required that the licensee should be a resident of the State, and thus prevented a non-resident of the State from selling liquor therein. That statute is as follows:

"SEC. 1. The county board of each county may grant licence for the sale of malt, spirituous, and vinous liquors, if deemed expedient, upon the application by petition of thirty

of the resident freeholders of the town, if the county is under township organization, and if not under township organization, then thirty of the resident freeholders of the precinct where the sale of such liquor is proposed to take place, setting forth that the man is of respectable character and standing and *a resident of this State,* and praying that licence may issue to him * * *"

The statute further provides for a hearing of the petition.

"SEC. 25. The corporate authorities of all cities and villages shall have power to licence, regulate, and prohibit the selling or giving away of any intoxicating malt, spirituous, and vinous, mixed or fermented, liquors within the limits of such city or village, the licence not to extend beyond the municipal year in which it shall be granted, and to determine the amount to be paid for such licence not less than five hundred ($500) dollars in villages and cities not having more than 10,000 population nor less than one thousand dollars ($1,000) in cities of the first class and cities having over 10,000 population."

"SEC. 11. All persons who shall sell or give away under any pretext malt, spirituous, or vinous liquors or any intoxicating drinks without having first complied with the provisions of this act and obtained a licence as herein set forth shall for each offence be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than one hundred dollars nor more than five hundred dollars or be imprisoned not to exceed one month in the county jail and shall be liable in all respects to the public and to individuals the same as he would have been had he given bonds and obtained the licence as herein provided." (Com. Laws 1887, Ch. 50, pp. 495, 498, 499.)

The result of the trial was a verdict and judgment for the defendant. The case was removed to the Supreme Court,

which held that the act was an exercise of the police powers of the State and therefore not within the commercial clause of the Constitution.

The error complained of is that the State courts held that the statutes above quoted were constitutional and gave judgment for the defendant.

In Walling *vs.* Michigan, 116 U. S., 446, this subject is dealt with where Mr. Justice Bradley says that the tax imposed in the act there under consideration could be justified as an exercise of the police power of the State if it did not discriminate against citizens and products of other States in a matter of commerce between the States and thus usurp one of the prerogatives of the National Legislature. The police power cannot be set up to control the inhibitions of the Federal Constitution or the powers of the United States Government created thereby. (New Orleans Gas Co. *vs.* Louisiana Light Co., 115 U. S., 650.)

It is hereby worth while to explain further how the statute of the State prohibits commerce between the citizens of other States and those of Nebraska. It is as direct as if it had said in so many words, "Citizens of Missouri shall not have commercial intercourse with our people." For when it requires that under severe penalties dealers in liquor have a license and adds that the license shall be granted only to residents the inhibition as to non-residents is absolute.

The nature of the liquor traffic and the control over it by the State almost always seem to bring it within the police power more than other subjects of commerce. But that is only an incident. It does not go to the root of the matter. Once say that commerce between the States shall be free,

and every article of commerce is under the protection of the declaration. Except one and exception of all soon follows ; the evils of intemperance are very great, but the evil of an inthralled social and commercial intercourse is greater. The former may be otherwise repressed, the suppression of the latter is destruction of the greatest blessings of the Union.

J. M. WOOLWORTH,
W. SWITZLER,
For Plaintiffs in Error.

Supreme Court of the United States.

LOUIS METTE and GEO. KANNE,
Co-Partners doing business under the firm name of Mette & Kanne,
Plaintiffs.

vs.

DANIEL L. McGUCKEN,
Defendant.

In Error from the Supreme Court of the State of Nebraska.

BRIEF FOR PLAINTIFFS IN ERROR.

F. A. Manger, Printer, 1402 Farnam St., Omaha.

Supreme Court of the United States

LOUIS METTE and GEO. KANNE,
Co-Partners doing business under the firm name of Mette & Kanne,

Plaintiffs.

vs.

DANIEL L. McGUCKEN,

Defendant.

In Error from the Supreme Court of the State of Nebraska.

BRIEF FOR PLAINTIFFS IN ERROR.

This was an action by plaintiffs in error, as wholesale liquor merchants, against the defendant in error, brought for the recovery of the value of liquors sold by the plaintiffs in error to defendant in error. When the bill of goods involved in this suit was sold, the plaintiffs in error were residents of St. Louis, Missouri, and citizens of said State, and had their place of business in said city, while defendant's place of business was in Omaha, Nebraska. Judgment was rendered in the court below, for defendant and the plaintiffs in error prosecuted their petition in error to the Supreme Court of the State of Nebraska, where the judgment of the lower court, to-wit: the District Court of Douglas County, was sustained. Plaintiffs in error therefore prosecute this petition in error to the Supreme Court of the United States.

* 18 Neb. 323

In the trial of the case in the District Court of Douglas County aforesaid, the presiding judge of the court, at the request of defendant in error, instructed the jury that in order to entitle the plaintiffs to recover for intoxicating liquors sold to defendant, the plaintiffs must have had, at the time of making such sale, a license to do so under the general liquor laws of the State of Nebraska, known in this State as the Slocum Law. The plaintiffs in error took exception to this ruling of the trial court in so instructing the jury, and urge upon the Court here that said Court did err in giving the jury said instructions, and in support of this view the plaintiffs in error say that the so called Slocum or liquor law of Nebraska is unconstitutional and void for the following reasons:

I.

The section of the liquor law of Nebraska which bears upon the case at bar, is Section 1 Chapter 50, Compiled Statutes of Nebraska, 1885, page 413, which reads as follows:

"The county board of each county may grant license for the sale of malt, spirituous and vinous liquors, if deemed expedient, upon the application by petition of thirty of the resident freeholders of the town, if the county is under township organization, and if not under township organization, then thirty of the resident freeholders of the precinct where the sale of such liquor is proposed to take place, setting forth that the applicant is a man of respectable character and standing, and a resident of this State, and praying that license may be issued to him. Such application to be filed in the office of the County Clerk, and upon the payment into the County Treasury of such sum as the board may require, not less than five hundred ($500) dollars for each license, and upon the compliance with the

provisions of this act: *Provided*, Such board shall not have power to issue any license for the sale of any liquors in any city or incorporated village or within two miles of the same."

Section 25 of said act is as follows:

"The corporate authorities of all cities and villages shall have power to license, regulate and prohibit the selling or giving away of any intoxicating malt, spirituous and vinous, mixed or fermented liquors within the limits of such city or village, the license not to extend beyond the municipal year in which it shall be granted, and to determine the amount to be paid for such licenses, not less than five hundred ($500) dollars in cities and villages having not more than 10,000 population, nor less than one thousand ($1,000) dollars in cities of the first class and cities having over 10,000 population;

"*Provided*, That in granting licenses or permits such corporate authorities shall comply with and be governed by all the provisions of this act in regard to granting of licenses, and all the provisions and penalties contained in this act shall be applicable to such licenses and the persons to whom they are granted."

This act, and these provisions thereof especially, the plaintiffs in error insist are unconstitutional and void for the reason that they violate the second section, article 4 of the Constitntion of the United States, which provides "The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States," and furthermore that these sections conflict with the Fourteenth Amendment to the same Constitution, which provides, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," and the same amendment declares that citizens of the United States are "citizens of the State wherein they reside."

It becomes important in this connection for us to call the attention of the Court to interpretations which have been given to the terms "privileges and immunities" as contained in the Constitution. The first occurrence of the words "privileges and immunities" in our constitutional history is to be found in the fourth article of the Old Confederation. In the Constitution of the United States which superseded these articles, the corresponding provision is found in section 2, article 4, as given above. The Supreme Court says (Slaughter Houses cases, 16th Wallace 36-130): "The purpose of both these provisions is the same, * * * * To declare to the several States that whatever these rights, as you grant or offer them to your own citizens, or as you limit or qualify or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of the citizens of other States within your jurisdiction."

Ward vs. Maryland, 12th Wallace 418.
Cooley's Constitutional Limitations 16.
Walling vs. Michigan, 116 U. S. 446.
Stockton-Laundry case, 26 Fed. Rep. 611.

In the recent case of ex parte Hanson, in an opinion filed by Judge Deady, of the District of Oregon, the learned Judge discusses the question of commerce among the States. The city of Portland, Oregon, has an ordinance levying a license on drummers and commercial travelers. Judge Deady decided the ordinance was lawful, in that it applied in terms to "all persons who shall go about from place to place, etc," and affected residents as well as non-residents. But if it had provided that only citizens of the State of Oregon could obtain a license to sell as drummers, it is quite manifest from the opinion that the ruling would have been different. We quote from the opinion as found at page 129, vol. 28, Federal Reporter, the following language:

"A tax or charge for a license to sell goods is in effect a tax on the goods themselves. Welton vs. Missouri, 91 U. S. 278. It is now well settled that a tax imposed by a State, directly or indirectly, on the products of another State, when brought within its limits or offered for sale therein, which in effect discriminates against said products and in favor of those imposing the tax, it is a regulation in restraint of commerce among the States, and as such is a usurpation of the power conferred on Congress by the Constitution of the United States. Ward vs. Maryland, 12 Wall 418; Welton vs. Missouri, 91 U. S. 275; Grey vs. Baltimore, 100 U. S. 434; Walling vs. Michigan, 116 U. S. 446. On the other hand, where the tax or charge is imposed equally on the products of the State imposing it and those introduced from other States, the law ordinance imposing the same is not a regulation of Commerce but only a legitimate exercise of the taxing power. Woodruff vs. Pittham, 8 Wall 123; Hinson vs. Lott, Id. 148; In re Rudolph, 6 Sawyer 295; Ex parte Robinson, 12 Nev. 263."

Surely a statute which prohibits altogether the citizen of another State coming into the State to sell their merchandise when it is allowed their own citizens to do so is a "regulation in restraint of commerce among the States."

In Colorado they have a statute which forbids foreign corporations doing any business in that State until certain certificates are filed with the Secretary of State, specifying where their principal places of business are in the State, and who their authorized agents are, etc. In the case of Cooper Manufacturing Company vs. Furgerson, et al, this statute came under consideration by this honorable Court, and (113 U. S. 727) it was decided in favor of the foreign corporation which was seeking to collect a bill contracted without compliance with the law. His Honor, Mr. Justice Woods, however, finding it unnecessary, in his opinion, to decide "whether their provisions invade the exclusive right

of Congress to regulate commerce among the several States." Mr. Justice Matthews, however, in expressing his views and those of Mr. Justice Blatchford, uses language pertinent to the question at bar, and is here quoted as follows:

"Mr. Justice Blatchford and myself concur in the judgment of the Court announced in this case, but on different grounds from those stated in the opinion.

"Whatever power may be conceded to a state to prescribe conditions on which foreign corporations may transact business within its limits, it can not be admitted to extend so far as to prohibit or regulate commerce among the states; for that would be to invade the jurisdiction which, by the terms of the constitution of the United States, is conferred exclusively upon Congress.

"In the present case the construction claimed for the constitution of Colorado, and the statute of that state passed in execution of it can not be extended to prevent the plaintiff in error, a corporation of another state from transacting any business in Colorado; which of itself is commerce. The transaction in question is clearly of that character. It was the making of a contract in Colorado to manufacture certain machinery in Ohio, to be there delivered to the purchaser in Colorado. That was commerce; and to prohibit, except upon conditions, is to regulate commerce between Colorado and Ohio, which is the exclusive province of Congress."

In the case in re Watson, 15 Fed. Rep. 511 cited herein, Watson being a non-resident was prosecuted for peddling without a license, under a statute which provides that no person shall be licensed as a peddler who has not resided in the state one year next preceding the application for a license. In declaring this act in conflict with the two clauses of the Federal Constitution under consideration in the case at bar, Judge Wheeler, of the district of Vermont, uses the following language:

"The relator is not prosecuted for peddling within the state when not a resident, but for peddling within the state without a license; and as a resident of the state so peddling like wares would be liable to similar prosecution, it is argued that there is no discrimination against his citizenship by this prosecution, and that to the extent of upholding the prosecution the statute is constitutional and valid, although beyond that it may not be; that he could not be prosecuted for selling without a license if he had a license, and that to avoid such a prosecution he should pay for and obtain a license as a resident of the state would. *This argument would be better founded if there was any mode provided by which he could obtain such a license.* But not only is no such mode provided, but, further, his obtaining one is expressly prohibited. It is said that it is this prohibition which makes the discrimination, and that the prohibition only is not constitutional. The offense is peddling without a license. Without the provisions requiring a license there would be no wrongful lack of a license, and no offense resting in the want of one. *These provisions exclude non-residents, and there can be no wrongful lack of a license as to them.* These provisions all stand together to make up the offense, and the part discriminating against the relator can not be taken away, and leave enough to make him guilty of the offense prosecuted for. The statute says to him that he shall not peddle without a license and shall not have a license. This is equivalent to saying to him that he shall not peddle at all. It is not even claimed on behalf of the state that such a direct provision could be upheld."

It is quite conclusively shown, by the authorities just cited, that among these privileges is the right to enter, pass through and engage in any enterprise which is open to the citizens of the States visited by the non-resident; subject, of course, to the same general terms, conditions and regulations which do not permit in one case and prohibit in the other.

DISCRIMINATION AGAINST NON-RESIDENTS.

We now proceed to consider in what provisions of the Slocum law is found an unlawful discrimination against non-residents. It is found first in the first section of said statute. Under that law, in order to obtain a license to sell liquors in this State, a "petition" must be filed with the proper authorities, "setting forth that the applicant is a man of respectable character and standing and a resident of this State, and praying that license may be issued to him."

It will be seen, that in order to obtain a license to sell liquor, certain things must be made to appear by a "petition" and among these essential things is one that the applicant is a "resident of the State." In other words in order to engage in the sale of merchandise of this character, a man must be a resident of the State. This petition is in the nature of a cause of action in a law suit or the statement of a case, and unless the facts required to be stated appear and are true, there is no obligation on the authorities to grant the license, and no right in the applicant to ask for it or to insist upon receiving it.

In the light of the above citations in regard to the guarantees of the Federal Constitution to the citizens of the different States, we say that this law, in this respect, is in conflict with them and is void. It deprives a man of his natural right to live where he pleases, to go where he pleases, to do business on an equal footing with all men, subject only to lawful regulations which are made to govern the particular avocation.

It will not be controverted that the right to sell intoxicating liquor is a common law right which, in the absence of legislation on the subject, a man has a right to engage in with perfect freedom. It will also be conceded that no State Legislature has the power to pass any law looking to the reg-

ulation of the liquor traffic which would discriminate against non-residents. But how is it under the act of the Legislature of Nebraska in question? A citizen of another State can not have the privilege of selling liquor in this State, for the reason that he must abandon his residence there in order to get the license, and then he is no longer a citizen of that State. It will not suffice to say that it is not necessary to state in the petition, or showing that the applicant is a resident of this State. It being the law it is necessary—as much so as to state any other prerequisite named in the statutes—and a man who can not so state cannot claim the ptivilege to sell. On page 570 of the 11th Nebraska Reports, it is said: "It will be seen that a license can not go out, as a matter of course, to whoever may apply, on payment of the required fee, but only when "deemed expedient" by the officers having the matter in charge, and on the application by petition of thirty resident freeholders of the precinct where the sale of such liquor is proposed to take place, setting forth that "the applicant is a man of respectable character and standing and a resident of this State, and praying that a license may be issued to him."

The court says further, "before any action shall be taken on such application, at least two weeks notice must be given, when, if there be no objection in writing made and filed, and all other provisions of the law *have been fully complied with*, it may be granted." So we see by this adjudication of the Supreme Court of Nebraska, in passing upon this law, that they hold to entitle a person to the license he must bring himself within all the provisions of this act.

Again, it is not necessary in this case to say that it is time enough to complain of not being able to get a license when you have applied for one and been refused. This argument would impugn the integrity of the officers of the law. We have no right to presume they would violate their obli-

gations and issue a license on an insufficient showing. It is a poor pretext to answer a defect in a law to say it will not be enforced. It must be observed, and we have no right to presume otherwise. Then again it is sheer folly to say we must ask for a thing we know we can not get, and for the procuring of which there is no way provided and under the existing law we know we are not entitled to.

These few suggestions on behalf of the plaintiffs in error will be sufficient to show the court that this law amounts to regulation so far as residents are concerned, and prohibition when applied to non-residents. This discrimination cannot be upheld under the clauses of the constitution referred to herein. We therefore say the court erred in instructing the jury that the plaintiffs, being non-residents, were required to have a license when the laws of the State have no provision for obtaining one, and when it was therefore impossible for them to have procured one.

15th Federal Reporter, in re Watson 511.
12th Wallace, Ward, vs. Maryland 418.
27th Missouri, State vs. North 467.
3rd E. D. Smith, Fire Dept. vs. Wright 478.
8th Wallace, Paul vs. Virginia 117.

If it is made to appear by the foregoing that this provision is void, then by the usual rules of construction the whole statute is void. We can not say that the Legislature would have passed this law without this clause, but it being a very material part of it, the presumption is they would not. "If the unconstitutional provisions so enter into the framework, texture and objects of the law that they must be held to have been inducements to its passage or to be essential to its operation," or if it is furthermore presumable that without them the law would not have been enacted, then the whole law must go. Tested by any of these criteria this law cannot stand. The matters complained of are important and fundamental.

II.

This provision in question of the Nebraska license law, is in conflict with the Federal Constitution in attempting to regulate commerce among the several states, the power expressly given to Congress. We do not dispute the right of any state in the Union to pass liquor laws which go so far, even, as to prescribe prohibition, but we do say that whenever the states undertake to pass liquor laws to regulate the liquor traffic, they must be so constructed as to operate alike upon citizens of the state where the law is made and upon citizens of other states. In other words it is perfectly competent for the different states of the Union to take hold of the liquor question and legislate upon it, regulate or prohibit it entirely, but in doing so they cannot frame a law which will allow their own citizens to deal in this class of merchandise to the total exclusion of citizens of other states. In the case at bar it would perhaps have been proper for the legislature of Nebraska to have enacted a law which provided that a certain license fee should be paid before a party would be entitled to sell liquor in this state, but in doing so opportunity must be given residents and citizens of other states engaged in the traffic, on the same terms and conditions which are prescribed for their own citizens. Regulation for their own citizens and prohibition for citizens of other states cannot stand under the Federal Constitution. Such a law would effectually deprive manufacturers of other states of the right to come into this state to sell their products, and in this way would violate the provision of the Federal Constitution in regard to regulation of commerce.

Walton vs. Missouri, 91 U. S. 275.
Weber vs. Virginia, 103 U. S. 344.
State vs. North, 27th Missouri 467.
R. R. Co. vs. Huron, 5th Otto 465.

III.

A party cannot reap the benefits of the purchase and then plead *ultra vires* or unlawful contract to defeat the payment of the price.

Bank vs. Matthews, 98 U. S. 621.
Bank vs. Whitney, 103 U. S. 99.
The Rep., vol. 19, page 310.
Harris vs. Runnels, 12th Howard 80.

These cases cited next above are cases arising out of the National Bank Act of Congress. The doctrine is there maintained that the plea of *ultra vires* is not valid to defeat the recovery by National Banks upon debts contracted in violation of law, the theory being that as the National Bank Act prescribes penalties for its own violation, that an aggrieved party must seek redress in those penalties, and that it is not competent for a person who has, for instance, received money from a National Bank upon real estate security, in violation of law to set up as a defense the unlawful making of the loan on the part of the bank. We think that the principle in the case at bar is the same, that where the person engaged in the liquor traffic has received goods and reaped the benefit of them that he is estopped from setting up the plea of want of authority on the part of the seller to deal in the merchandise in the manner indicated.

IV.

The Slocum law, so called, we contend does not apply to wholesale houses such as the facts admitted in the case at bar show the plaintiffs in error to have been. The act referred to contains several provisions in regard to screens, obstructions, selling on election days, selling to minors,

treating, etc., which would sustain this view. The act unde
takes to prescribe how the appearances of the places whe
the liquor is sold shall be arranged in regard to obstructio
in the way of screens, etc., which we think and insist w
intended to relate solely and entirely to retail houses.
certainly could not be urged that the legislature of Nebras
could have power to designate the physical arrangements
the house of business of the plaintiffs who are residents of S
Louis, Missouri, and had their place of business in said cit
Nebraska has no right to say how a house in St. Louis sha
be built, or whether a store building located there shall ha
screens or not. If it is intended to apply to extra territori
houses, then it is void for reasons stated above.

Although we contend that the regulation in regard to a
plication for license is a fundamental, component part of t
whole act, and that if said section is unconstitutional, as
think it clearly appears, that the whole act must fall with
yet we are free to admit that for the purpose of this proceedi
in error it is sufficient for us to call in question the validity
only the first section of said act, or so much thereof
unlawfully discriminates against non-residents.

WARREN SWITZLER,

Attorney for Plaintiffs in Error.